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**February 19, 2015**

**VIA ELECTRONIC FILING**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

**Re: *Open Internet Remand Proceeding*, GN Docket No. 14-28; *Framework for Broadband Internet Service*, GN Docket No. 10-127**

Dear Ms. Dortch:

For decades, the Commission has been of the consistent view that broadband Internet access service is an information service—and *not* a telecommunications service—under the Telecommunications Act of 1996 (the “1996 Act”). As Verizon and others have explained, reclassification of broadband as a telecommunications service would be a radical and risky departure from that long-standing and correct position.<sup>1</sup> Nevertheless, Chairman Wheeler recently proposed new rules premised in part on reclassification.<sup>2</sup> Although the proposal

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<sup>1</sup> See, e.g., Verizon Comments, GN Dkt. Nos. 10-127 & 14-28, at 47-51, 55-56 (July 15, 2014) (“Verizon Comments”); AT&T Comments, GN Dkt. Nos. 10-127 & 14-28, at 51-63 (July 15, 2014); Verizon Comments, at 57-69; Letter from Michael E. Glover, Verizon to Marlene H. Dortch, FCC, GN Dkt. Nos. 14-28 & 10-127, at 1-12, 15-20 (Oct. 29, 2014) (attaching *Title II Reclassification and Variations on that Theme: A Legal Analysis*) (“Verizon White Paper”).

<sup>2</sup> *Fact Sheet: Chairman Wheeler Proposes New Rules for Protecting the Open Internet*, FCC (Feb. 4, 2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-331869A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-331869A1.pdf) (“Fact Sheet”).

purportedly aims to “modernize Title II, tailoring it for the 21<sup>st</sup> century,”<sup>3</sup> that approach remains unlawful on multiple grounds.

Broadband Internet access service is not, and cannot reasonably be reclassified as, a telecommunications service. In 2002, the Commission first ruled (and the Supreme Court affirmed) that broadband was an integrated information service; today, broadband is more of an information service than ever before. Contrary to the suggestions of some parties, neither the existence of ads highlighting that transmission speeds are relevant to consumers, nor efforts to dismiss integrated information service components as “adjuncts” to a hypothetical “basic” transmission service, can change the factual and legal underpinnings of the Commission’s previous classification decisions. Reclassification thus would compel broadband providers to offer their information service on a common-carriage basis—a major regulatory shift that would violate both the 1996 Act and the Constitution. Moreover, because the Chairman’s most recent proposal would reverse the Commission’s well-established factual findings and upset significant reliance interests, reclassification would face heightened scrutiny in the courts. A bare desire to regulate would not survive that bar, nor would an attempt to “tailo[r]” or “modernize” an act of Congress. Reclassification would be arbitrary, capricious, and otherwise contrary to law.

### **Broadband Internet Access Service Cannot Reasonably Be Reclassified As A Telecommunications Service.**

Commissioner Wheeler’s proposal to treat broadband as an “offering of telecommunications,” 47 U.S.C. § 153(53)—*i.e.* a pure transmission service—would be unreasonable for multiple reasons. As the Commission has repeatedly recognized, and the Supreme Court has affirmed, broadband simply *is not* a “telecommunications service.”<sup>4</sup> Rather, broadband *enables* consumers to remotely access or publish webpages, store data in the cloud, send and retrieve email, and stream videos or other media content. Broadband thus is the quintessential information service: it is “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. § 153(24). No other conclusion would be reasonable.

To find that broadband service is a pure transmission service would require the Commission to make unsupported and unreasonable factual findings about the nature of that service. When consumers use broadband, their goal is not simply to “send” and “receive” information from one end point to another. Rather, they aim to acquire, retrieve, and manipulate information located on remote servers. These are all fundamental attributes of information services: the driver is *the information*, not *the transportation of the information*.<sup>5</sup> Indeed, data

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<sup>3</sup> *Id.* at 4.

<sup>4</sup> See Verizon White Paper, at 5 & n.4.

<sup>5</sup> That, after all, is why the Internet was referred to in its early days as the “information superhighway.” See L.R. Shannon, *Getting Your Feet Wet In A Sea Called Internet*, New York Times, (Oct. 26, 1993) (“One of the technologies Vice President Al Gore is pushing is the information superhighway, which will link everyone at home or office to

transmission is used only in conjunction with these information-related capabilities,<sup>6</sup> and if anything is today even more tightly integrated with the information-service components of broadband service than it was when the Commission issued its first classification decision. Broadband service now offers consumers even more security functions, and more capabilities for publishing web content, using email, and accessing on-line storage.<sup>7</sup> In short, the information service piece and the telecommunications piece of broadband are thus more tightly integrated and operate as a seamless, single service more so than ever before.

Increasingly, too, broadband service resembles the regulatory progenitor to the statutory definition of “information service”—“advanced” service—whereby consumers would remotely access a provider’s facilities to retrieve, store, and manipulate data. For example, some broadband providers have begun to allow other Internet players (such as Netflix) to set up CDNs attached at the so-called “last-mile” portion of their networks, meaning that Internet content is increasingly housed in caching servers located within a broadband provider’s front office.<sup>8</sup> A number of broadband Internet access services also now include cloud-based services whereby consumers can remotely access a broadband provider’s servers to perform various computing functions. Just like an “advanced” service—and hence an information service—broadband service increasingly offers consumers the capabilities for remotely accessing, storing, retrieving, and manipulating information on servers located at a broadband provider’s facility.

Some have tried to overcome this statutory and underlying factual problem by arguing that the telecommunications component of broadband is a separate telecommunications service, and that the Commission should ignore all of the information service components that are part of the offering to consumers. For example, Public Knowledge has suggested that, because certain broadband advertisements emphasize the speed or volume of data transmission, there is a severable, high-speed data transmission service that is “offer[ed]” by broadband providers.<sup>9</sup> Speed has *always* been a focus of broadband advertising, however, as the attached

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everything else—movies and television shows, shopping services, electronic mail and huge collections of data.”).

<sup>6</sup> See, e.g., Verizon Comments at 59–61. From a technical standpoint, a consumer’s computer inputs a protocol for remotely performing information-service functions, and a broadband provider then identifies and filters the information on its return path using DNS and security controls.

<sup>7</sup> See Verizon Comments at 60–61; Verizon White Paper at 7–8.

<sup>8</sup> For an overview of these developments, see Verizon Comments at 72–73; Letter from William H. Johnson, Verizon to Marlene H. Dortch, FCC, GN Dkt. Nos. 14-28 & 10-127, at 4 (Dec. 17, 2014).

<sup>9</sup> See, e.g., Comments of Public Knowledge, Benton Foundation, Access Sonoma Broadband, GN Dkt. Nos. 14-28, 10-127 & 09-191; WC Dkt. No. 07-52, at 63 & App. A (July 15, 2014) (“Public Knowledge Comments”).

advertisements show.<sup>10</sup> That fact provides no justification for changing the Commission’s statutory interpretation *now*.

Nor does such advertising change the nature of broadband service. To be sure, speed and volume are important purchasing factors to some consumers, and those factors can differentiate competitors—which is why Verizon has spent billions in deploying fiber and 4G LTE capabilities that enable higher speed services and why we highlight these advanced capabilities in our ads.<sup>11</sup> But to the extent advertising is relevant, it shows only that consumers still “*obtain ... information ... via telecommunications,*”<sup>12</sup> they just do so faster than before. And that does not undermine the Commission’s previous information service classifications.

It is likewise plain that the information-service components of broadband cannot be treated as “adjunct to” basic services, as some have suggested.<sup>13</sup> For starters, the *Open Internet NPRM* did not even mention “adjunct-to-basic” services, so the Commission cannot justify its action on that rationale.<sup>14</sup> More importantly, the “adjunct-to-basic” category presumes that the *telecommunications*, not the information piece, is primary—if applied to the information service components of broadband, that category would turn upside down the purpose of broadband, which, as explained above, is the acquisition and use of information, not the transportation of that information. With broadband, in fact, there is not any “basic service” that could be reasonably called a “telecommunications service,” to which these other components could be deemed “adjunct.”<sup>15</sup>

Even more troubling, there is no statutory hook for the “adjunct-to-basic” category of services, which appears nowhere in the 1996 Act and was not the basis for any provisions in the

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<sup>10</sup> See Appendix 1 (providing sample of past advertisements of broadband providers).

<sup>11</sup> Speed and volume are not the only factors that consumers consider: price and their particular needs are important variables as well. Many consumers still use slower-speed services even when faster speeds are available to them, either because they do not want to spend more for higher speeds or simply do not need it if they use their Internet access for basic purposes.

<sup>12</sup> 47 U.S.C. § 153(24) (emphasis added).

<sup>13</sup> See, e.g., Public Knowledge Comments at 76–78.

<sup>14</sup> See *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014) (“*Open Internet NPRM*”).

<sup>15</sup> That is one reason why the Commission correctly classified broadband as an information service long ago. See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, et al.*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶¶ 34–39 (2002) (“*Cable Modem Order*”).

Act.<sup>16</sup> The Act classifies services as either telecommunications or information services; the Commission cannot rewrite these statutory categories by defining certain integrated “information service” components as “adjunct to” a hypothesized “basic” service. Any information service could be redefined in this way: just call the telecommunications component a separate telecommunications service, and call the information service components “adjunct to” that service. That is not what Congress intended when it codified two distinct and mutually exclusive categories of services. Even had Congress implicitly recognized the Commission’s previous “adjunct-to-basic” category, that category pertained only to traditional *telephone* service with no applicability to broadband whatsoever.<sup>17</sup> It is not reasonable to interpret a statute *rejecting* the Commission’s taxonomy as implicitly authorizing the Commission to *extend* that taxonomy to any and every type of service it wishes.

For all of these reasons, it would be arbitrary and capricious, and otherwise contrary to law, for the Commission to find that broadband is a “telecommunications service.”

**The Commission Cannot Lawfully Compel Broadband Providers To Offer A Common-Carriage Telecommunications Service.**

Even putting to one side that there is no factual justification for reclassification, reclassification would pose insurmountable legal pitfalls as well.

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<sup>16</sup> The Commission has previously intimated that the “adjunct to basic” category, which pre-dated the 1996 Act, may have survived in the “management exception” to the statutory definition of “information services.” *Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866, ¶ 59 (2010) (discussing 47 U.S.C. § 153(24)). But that exception is merely a means of allowing certain providers to “improve their telecommunications networks without running afoul of the restriction on providing information services.” *Petition for Declaratory Ruling that pulver.com’s Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, ¶ 13 (2004).

<sup>17</sup> The “adjunct-to-basic” category has only ever been applied to traditional telephone service to describe an information service that “facilitate[s] establishment of a basic transmission path over which a telephone call may be completed, without altering the functional character of the telephone service.” *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1932, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21,905, ¶ 107 (1997). That description plainly has no relevance to broadband. And it doubly cannot apply to broadband storage and cloud-computing features, which are integrated with data transmission but do not “facilitate” that transmission at all. See *NATA Petition for Declaratory Ruling under § 64.702 of the Commission’s Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, Memorandum Opinion and Order, 101 FCC 2d 349 (1985), *recon.*, 3 FCC Rcd 4385 ¶ 1 (1988) (classifying Customer Dialed Accounting Recording as an enhanced service because it allowed subscribers “to use the telephone companies’ electronic switches for the storage and retrieval of customer business information”).

As a purely statutory matter, the 1996 Act does not reasonably permit the Commission to treat the telecommunications component of broadband as a separate telecommunications service. Under that approach, *every* information service would be a telecommunications service because all information services, by definition, use “telecommunications,” as the plain language of the statute makes clear.<sup>18</sup> Accordingly, reclassification of broadband would produce the absurd result of subjecting virtually all Internet services to common-carriage regulation.<sup>19</sup> The Commission has previously termed this approach “radical surgery”<sup>20</sup>—and for good reason. It would obliterate Congress’s intent to create two, mutually exclusive categories of “information service” and “telecommunications service,”<sup>21</sup> and to shield new “advanced” services from legacy regulation.<sup>22</sup>

*Second*, the Commission may not lawfully reclassify broadband because Title II applies only to a service that already *is* offered as a common-carrier telecommunications service; it nowhere purports to authorize the Commission to *require* a provider to offer any service on a common-carriage basis.<sup>23</sup> Yet in an effort to adopt uniform, nationwide rules, the Commission cannot reasonably hope to examine every broadband Internet access service, offered by every provider, and conclude that all providers in the country offer a stand-alone, pure transmission service on a common-carriage basis. As a result, the Commission would be forced to simply *compel* broadband providers to offer their service on a common-carriage basis, without regard to how those providers currently operate, in order to treat them as telecommunications service providers subject to Title II. But the D.C. Circuit long ago rejected the proposition that the Commission has “unfettered discretion . . . to confer or not to confer common-carrier status on a given entity depending upon the regulatory goals it seeks to achieve.”<sup>24</sup>

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<sup>18</sup> 47 U.S.C. § 153(24) (defining “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via* telecommunications”).

<sup>19</sup> See Verizon White Paper at 10.

<sup>20</sup> *Cable Modem Order*, ¶ 43.

<sup>21</sup> See Verizon Comments at 57 & n. 154, 61–62. Because Congress explicitly predicated *distinct* regulatory regimes on these different definitions, the Commission cannot reasonably conclude that the categories overlap. See 47 U.S.C. § 153(51) (“A telecommunications carrier shall be treated as a common carrier under this chapter [and thus subject to Title II] *only* to the extent that it is engaged in providing telecommunications services.” (emphasis added)).

<sup>22</sup> See *id.* § 230(b)(2) (explaining “policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation”).

<sup>23</sup> See Verizon White Paper, at 1–3.

<sup>24</sup> *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) (“*NARUC I*”).



*Third*, compelled common carriage would violate the Constitution. Because compelled common carriage would constitute a government taking, the Commission would need congressional authorization and a finding that broadband providers have monopoly power. As Verizon has explained, however, Title II provides no such authorization, and there is no plausible basis for making a uniform finding of *monopoly* power nationwide and for all broadband providers, as would be needed to justify uniform, nationwide rules.<sup>25</sup> In addition, because broadband providers are the modern-day equivalent of the printing press, they cannot be singled out—from Internet backbone services, CDNs, and other services with a similar ability to exercise editorial control over their content—for conscription to speak on the government’s terms.<sup>26</sup> Any attempt to do so would violate broadband providers’ First Amendment rights.

Accordingly, reclassification would be unlawful even if the Commission could rationally make the requisite factual findings (which it cannot).

### **The Commission Cannot Reverse Course In Order To “Modernize” Title II.**

Compounding all of these factual and legal problems is the Commission’s stated purpose to effectively *revise* its authorizing statute in order to reverse a well-established and successful policy. This entire mode of regulation-by-tailoring is unlawful under the APA.

As the Supreme Court recently explained, “an agency has no power to ‘tailor’ legislation to bureaucratic policy goals” by interpreting a statute so as to create a regulatory system “unrecognizable to the Congress that designed it.”<sup>27</sup> The fact that the agency would “lay claim to extravagant statutory power” is no less reasonable, the Court concluded, simply because the agency significantly “tailor[s]” that power.<sup>28</sup> The very fact that the Commission feels the need to re-work so many provisions of Title II is proof that Congress never intended for Title II to apply to broadband providers.<sup>29</sup>

Reclassification would be especially flawed in this instance because it would be predicated on the reversal of numerous factual and legal findings. Those reversals, as well as the “serious reliance interests” that have arisen from the Commission’s previous policy of light-touch regulation, would require the Commission to provide “a more detailed justification” for its change of course.<sup>30</sup> A simple desire to “modernize” an authorizing statute is not a permissible justification, let alone a detailed one. Nor would the Commission’s desire for prophylactic

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<sup>25</sup> Verizon White Paper at 3–4.

<sup>26</sup> Verizon Comments at 67–68.

<sup>27</sup> *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, at 2444, 2445 (2014).

<sup>28</sup> *Id.* at 2445.

<sup>29</sup> *Cf. id.* at 2442–44.

<sup>30</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

regulation suffice.<sup>31</sup> The mere desire to regulate cannot be the justification for regulation—that would be, quite literally, regulation for regulation’s sake.

Verizon remains committed to an open Internet and to allowing customers to access the content they want, when and where they want it. But it is for Congress, not the Commission, to decide whether to expand the Commission’s authority and whether to establish a heavy-handed regulatory regime that would endanger the entire Internet ecosystem. The Commission should reject this approach.

Sincerely,

A handwritten signature in black ink, appearing to read "William H. Johnson". The signature is fluid and cursive, with a prominent "W" and "H".

William H. Johnson

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<sup>31</sup> The record clearly establishes that reclassification would be pure prophylaxis: there have been no harms to the open Internet since the 2010 proceeding, when the Commission determined that reclassification was not necessary at all. Moreover, Chairman Wheeler’s proposal provides for Title II jurisdiction over interconnection without, supposedly, applying any Title II provisions. *See Fact Sheet* at 3. That is nothing more than a naked power grab.




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\*\$15/mo. discount available only to customers who sign up for Verizon FiOS Internet, 15 Mbps/2 Mbps with a one-year agreement and applies to the first three (3) months of service only. FiOS Internet will be \$44.95 for months 4-12. At the end of the annual contract, the monthly recurring charge will be at the then-current monthly rate. Other service speed options and month-to-month pricing available. Offer only for select customers and is non-transferable. Cannot be combined with other discounts or promotions. Limited time offer applies 12/15/06.  
Offer for new Verizon FiOS Internet residential customers only. One-year commitment required. \$10.00 activation fee will apply to each FiOS Internet order. Verizon FiOS Internet service is provided by Verizon Online and is not available in all areas. Service availability subject to final confirmation by Verizon. Verizon installation required. Free installation (includes main computer only) there will be an add-on charge for all additional computers. Acceptance of Verizon Online Terms of Service is required. Minimum system requirements apply. Equipment provided will be new or a fully inspected, tested and warranted return unit. Limited to one router provided at no charge per household per FiOS service. FiOS Internet and/or FiOS TV. If service is cancelled between months 2 and 12, \$50 early termination fee may apply, and router provided at no charge must be returned to \$100.00 equipment fee applies. Month-to-month packages are available. The 30-day money back guarantee applies to Verizon Online charges only. CTS or higher grade broadbanding or security (DSL/Fiber) device cable is required. Only Web-based features of Verizon FiOS for FiOS and Macintosh® compatible. Software for MSN® Premium versions of Verizon FiOS is not Macintosh® compatible. Connection speeds are between your location and the Verizon service office serving your location. Actual download and upload speeds will vary based on numerous factors, such as the condition of wiring at your location, computer configuration, Internet and network congestion, and the speed of Web site servers you access, among other factors. Speed and uninterrupted use of the service are not guaranteed. Home networking bandwidth shared by multiple users, wireless routers, and simultaneous usage may affect individual users' throughput speed. Applicable laws apply. Void through 12/15/06. Other terms and conditions apply. Offer subject to change without notice.  
Power for service provided on the Verizon FiOS network must be supplied by the customer. Customer is responsible for backup battery replacement. Backup battery does not supply power for Internet or video services. Certain telephones, answering machines, and other telephone equipment not meeting industry standards may not work with service provided on the Verizon FiOS network. Current Verizon Online DSL customers who move to FiOS Internet service will have their Verizon Online DSL permanently disabled after their FiOS connection. ©2006 Verizon. All rights reserved.

VFIO60003

Verizon 2006 print ad



#25 in the Verizon FiOS Internet profiles

**INTERNET  
FAST ENOUGH  
TO WOW MY KIDS?  
I WANT THAT.**

BA014107MD

The advertisement features a close-up portrait of a woman with dark hair, smiling slightly. The text is overlaid on the left side of the image. A red banner at the top left contains the text '#25 in the Verizon FiOS Internet profiles'. The main headline is in large, bold, white capital letters. A small code 'BA014107MD' is visible in the bottom right corner of the image area.